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July 31, 1986

Robert E. Bosso, Esq.  
Adams, Levin, Kehoe, Bosso,  
Sachs & Bates  
323 Church Street  
Santa Cruz, CA 95060

Dear Mr. Bosso:

Re: Proportional Interests in Partition

This is in response to your letter dated June 3, 1986, in which you ask our opinion on whether the following transaction will constitute a change in ownership. The facts as set forth in your letter are as follows:

Two couples purchased a parcel of property as tenants in common with each owning a 50 percent undivided interest. Before 1978, three units which were approved for condominiums were constructed on the property, however, no separate parcels were created. The parties now intend to transfer two of the units and all of the remaining debt to one couple, and to transfer the remaining unit to the other couple. As an example of the proposed transaction, you assume that the three units are each worth \$100,000 for a total value of \$300,000 and the debt against all three is \$100,000. One couple will take two units worth \$200,000 and the debt of \$100,000, and the other couple will take a unit free and clear with a value of \$100,000. You ask whether such a partition would be excluded by Section 62(a)(1) of the Revenue and Taxation Code.

Revenue and Taxation Code Section 62(a)(1) provides that any transfer between coowners which results in a change in the method of holding title to the real property transferred without changing the proportional interests of the coowners in that real property, such as a partition of a tenancy in common, is not a change in ownership. Therefore, the issue to be decided is whether assumption of a lien on the real property constitutes part of a proportional interest of the coowners in the property for the purposes of section 62(a)(1).

Revenue and Taxation Code Section 60 defines what interest in property must be either retained or transferred for purposes of

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change in ownership. Section 60 provides that "[a] 'change in ownership' means a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest." This is the interest in property which must be divided proportionately by the coowners in a partition.

Whatever its form, an instrument executed by the owner and delivered to the lender to make real property security for an obligation is a mortgage. (Civ. Code, § 2924; 2 Ogden's Revised California Real Property Law, p. 895.) A mortgage does not operate as a transfer of title whatever its terms, but merely imposes a lien on the property in favor of the mortgagee to secure performance of the obligation. The mortgagee does not, by the mortgage alone, acquire any right to possession, rents, or profits from the property. (Civ. Code, § 2888; Ogden, supra, at p. 895.) Because a mortgage is only a lien, it does not change but merely charges the mortgagor's title. He remains the owner and may convey, homestead, improve, or further encumber the property. In short, he may exercise all the rights he possesses on the mortgage date or later acquires subject to the lien of the mortgage. (Ogden, supra, at p. 897.) Thus, assumption of a lien against property is not an interest of the coowners in the property that can be measured in determining the proportional interests because it is not an interest which includes a beneficial use of the property which is substantially equal to its fee value.

In addition to the foregoing, we note that the partition statutes themselves do not support the theory that assumption of an lien constitutes part of value measured in determining the division of property in a partition. Civil Procedure Code Section 872.820 governs the application of proceeds from property sold in an action for partition. That section provides that the proceeds shall be applied in the following order:

- (1) For payment of expenses of sale;
- (2) For payment of the other costs of partition;
- (3) For payment of any liens on the property; and
- (4) For distribution of the residue among the parties in proportion to their shares as determined by the court.

Thus, by statute, the interest of a lien holder is deemed to be separate and different than the interest of a coowner of the property.

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In conclusion, it is our opinion that under the proposed division, the proportional interests in the property will not be maintained. This opinion is advisory only and the final determination rests with the assessor.

Very truly yours,

Michele F. Hicks  
Tax Counsel

MPH:cb

cc: Hon. Robert C. Petersen  
Santa Cruz County Assessor

bc: Mr. Gordon P. Adelman  
Mr. Robert H. Gustafson  
Mr. Verne Walton